Nelson Electrical Contracting Corp., d/b/a Nelcorp *and* International Brotherhood of Electrical Workers, Local Union No. 325, AFL–CIO. Cases 3–CA–18202 and 3–CA–18297

February 28, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On September 21, 1994, Administrative Law Judge Claude R. Wolfe issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed cross-exceptions and a brief in support of its exceptions and in opposition to the General Counsel's exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Nelson Electrical Contracting Corp., d/b/a Nelcorp, Union, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Thomas J. Sheridan, Esq., for the General Counsel.
Jeffery A. Tait, Esq., for the Respondent.
Richard M. McPherson, Organizer, for the Union.

DECISION

STATEMENT OF THE CASE

CLAUDE R. WOLFE, Administrative Law Judge. This consolidated proceeding was litigated before me at Binghamton, New York, on August 8 and 9, 1994, pursuant to charges filed by the International Brotherhood of Electrical Workers, Local Union No. 325 (the Union) on November 1 and December 22, 1993,[1] and a consolidated complaint issued February 8, 1994, alleging Nelson Electrical Contracting Corp., d/b/a Nelcorp (the Respondent) has violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (1) threatening a union agent with civil and criminal charges because he visited Respondent's jobsites and there engaged in legitimate union activities; and (2) instructing an employee to remove union insignia; and further alleging the layoff of David A. Harageones on November 30 because he engaged in protected union activity and Respondent's subsequent refusal to recall him, thereby discouraging its employees from engaging in union activities, violated Section 8(a)(3) and (1) of the Act. Respondent denies it has so violated the Act.

Upon the entire record in this case,[2] and after considering the comparative testimonial demeanor of the witnesses appearing before me and the posttrial briefs of the parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

The complaint alleges, the Respondent admits, and I find that, at all times material to this proceeding, the Respondent, a New York corporation with its principal office and place of business located in the town of Union and the State of New York, has been engaged from that place of business in the building and construction industry as an electrical contractor at various jobsites, and that during the 12 months preceding the issuance of the consolidated complaint, Respondent, in conducting these business operations, provided services from this facility valued in excess of $50,000 to other enterprises directly engaged in interstate commerce, and has been engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. LABOR ORGANIZATION

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

III. ALLEGED UNFAIR LABOR PRACTICES

A. *Chronology*

Harageones, a union member, was requested by Richard M. McPherson, a union organizer, to seek employment with the Respondent, a nonunion employer, for the purpose of encouraging Respondent's electricians to become union adherents. Harageones, a licensed electrician, acceded to McPherson's request, applied for employment with the Respondent, and was hired and commenced work for Respondent on October 4 at an hourly wage rate of $14. On hire, Harageones was told by Dean Rypkema, Respondent's vice president and overseer of its construction work,[3] that Respondent needed a licensed electrician on its project at a retail strip center (Price Chopper job), in Endicott, New York. Garbade Construction Corporation (Garbade) was the general contractor on this project, and subcontracted the electrical work at shops on the strip to the Respondent.

When Harageones started working at the Price Chopper job, he was supervised by Mark Schabel. On or about October 13, Schabel was transferred to another job, thereby leaving Harageones as the only electrician at the site. Harageones was then given a wage increase to $15 an hour. He worked alone until on or about October 20, when electricians Gowen and Spafford were recalled from layoff and assigned to work with Harageones at the Price Chopper job. There is no per-

[1] All dates are 1993 unless otherwise indicated.

[2] The General Counsel's request that G.C. Exh. 9, a purported partial transcript of G.C. Exh. 10 which is a tape recording, be entered into the record is denied. G.C. Exh. 10 is the best evidence. The General Counsel's motion to correct the record in several respects is granted.

[3] Respondent admits Rypkema is its supervisor and agent within the meaning of Sec. 2(11) and (13) of the Act.

suasive evidence that Harageones supervised these two men, who were subsequently laid off on November 1. On or about that date, Rypkema told Harageones that when the Price Chopper work was completed he would send Harageones to another of Respondent's projects.[4]

On November 22, Rypkema told Harageones that he hoped Respondent's work at the Price Chopper location would be completed by November 24, and that when it was finished he would send Harageones to another job or have him do some work at Rypkema's home.

On November 24, Harageones, armed with a concealed tape recorder which Union Organizer McPherson had supplied him, went to Respondent's shop to secure materials from Donn Weber, who was then Respondent's purchasing agent but has not been shown to have been a supervisor of Respondent at the time, though he later was elevated to the position of corporate treasurer, which he held at the time of the hearing before me. That day, Harageones had, apparently for the first time, worn a cap bearing the Union's logo and a T-shirt similarly imprinted. He was wearing a coat over the T-shirt, and I find the printing thereon was covered by the coat and was not visible to Weber or Rypkema, who entered while Harageones was dealing with Weber. Upon seeing Harageones' cap bearing the Union's logo, Rypkema handed him a company cap and told him to wear it. Rypkema added to this adjuration the comment ''You don't work for the IBEW.'' When Harageones replied that he had received the cap from a friend, Rypkema stated the Company was not union and the Union harassed Respondent all the time. Harageones complied with Rypkema's suggestion, doffed the union cap, and donned the company cap.

On that same day, after the cap incident, Rypkema told Harageones he would be assigned another job. No one worked the next 4 days.

On November 29, Harageones was assigned to work on another project at Sayre, Pennsylvania, for 1 day. That evening, Rypkema directed him to return to the Price Chopper job on November 30 to complete it. Harageones complied. On the afternoon of November 30, Rypkema, who was out of town on vacation, called Weber and told him to lay Harageones off for lack of work. Accordingly, Harageones was laid off on November 30. On several days thereafter, Harageones unsuccessfully called Respondent's office in an effort to contact Rypkema to request recall to work. Rypkema was not available while he was on vacation, until December 6. According to the credible testimony of Holly Moseley, a secretary and receptionist for the Respondent, Harageones, prior to making these calls, talked to her on November 30 after he was advised of his layoff, asked to talk to Rypkema, who was not there, asked if there was any work available, and said that although Rypkema had told him the job was temporary, Harageones needed more work to provide him with the funds to purchase Christmas presents for his children.

In late March or early April 1994, Harageones called Rypkema and asked if he could come back to work. Rypkema told Harageones to come in and talk to him. Harageones, who by then had been named in the complaint as an alleged discriminatee, did not do so. Harageones had not been recalled to work when he testified before me.

Throughout his employment with the Respondent, Harageones, at McPherson's request, kept daily logs detailing various conversations with other employees and Rypkema, including the above-described November 24 cap incident. There is no evidence Respondent knew the logs existed or suspected Harageones was a union adherent, until Harageones wore the union cap on November 24.

Respondent was aware, however, that Union Organizer McPherson had been visiting its jobsites at Price Chopper and other locations and, in an effort to curb these visits, caused its attorney to send the following letter to McPherson on October 27:

> Dear Mr. McPherson:
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> We are writing to you on behalf of our client, Nelcorp (Nelson Electrical Contracting, Inc.).
>
> Nelcorp officials have reported to us several documented instances where you have trespassed on private job sites on which Nelcorp is working. These job sites include Elizabeth Church Manor in the Town of Dickinson, Chesapeake Packaging in the Town of Conklin and Price Chopper Plaza in the Village of Endicott.
>
> This letter is to advise you that you do not have permission to enter these or any other Nelcorp job sites. If you do enter these, or any other Nelcorp job sites, Nelcorp will pursue both civil and criminal charges against you and your employer.
>
> Your conduct is both dangerous and disruptive. Your interference with work at the job sites poses a risk of injury to our employees as well as to you. We are very attentive to safety on our job sites. Your actions interfere with safety on these job sites.
>
> We appreciate your anticipated cooperation in this matter.

The Respondent was an electrical subcontractor at the three jobsites referenced in the letter, not a general contractor. McPherson visited all three projects and sought and received permission from the general contractor at each site to enter the project grounds. He credibly relates that he visited Gleason Electric (Gleason) twice a week at the Price Chopper site, and that he also talked to Harageones and two more of Respondent's employees for a few minutes when he visited that site (Gleason has a collective-bargaining agreement with the Union that contains a proviso that the Union's representative ''shall'' be allowed access at any reasonable time where employees covered by the agreement are working). After visiting that jobsite, McPherson called the local code enforcement agency, who then removed several electricians from the job. At the Elizabeth Church Manor project, he received permission from the general contractor to enter and make sure Respondent was paying the prevailing wage rate. While there, he asked Bob Fox, an employee of Respondent, if he knew what the prevailing wage rate was. At the Chesapeake Packaging site, he asked John Nelson, an employee of Respondent, to join the Union. He wore a hardhat and safety glasses while on the jobsites. There is no evidence he interfered with work or created a safety hazard on any of the jobs.

Earlier, in September 1992, McPherson had visited a jobsite where employees of Respondent were working and gave

[4] Harageones, a believable and more credible witness than Rypkema, an occasionally evasive witness, is credited where his testimony conflicts with that of Rypkema.

union literature to the Respondent's foreman. He also met with Mark Nelson, Respondent's president, in September 1992 and told Nelson he was now a union organizer and was interested in Respondent becoming a union company.

B. *Discussion and conclusions*

The Respondent was aware as early as September 1992 that McPherson was intent on organizing its employees. Its efforts to exclude McPherson from jobsites, over which Respondent as a mere subcontractor had no overall authority, for purported dangerous and disruptive conduct, which has not been shown to have existed, combined with Rypkema's conduct on November 24 when he observed the union hat worn by Harageones, displays Respondent's continuing antipathy toward union activity. Rypkema's observance of Harageones on November 24 wearing a cap with the Union's logo on it clearly gave him reason to suspect Harageones was a union adherent. This combination of Respondent's antiunion sentiment and its sudden discovery that Harageones wore a union cap, together with the fact Rypkema had promised Harageones continued employment at another jobsite or Rypkema's home as late as November 22 but did not provide such employment after the hat incident, are reasons sufficient to support an inference Harageones' known or suspected union sympathies played a part in his layoff and the failure to reassign him other work as promised.

On the other hand, the Respondent's records show Harageones was Respondent's least senior electrician when he was laid off. Four senior journeyman electricians were laid off before Harageones was laid off. One of these four was recalled for 2 weeks in December 1993 and January 1994, and then again laid off and never recalled. Another was never recalled. A third was recalled in late April 1994. The fourth was recalled in May 1994. Yet another senior electrician was laid off in January 1994 and not recalled until April 1994. Another was laid off in January 1994 and recalled in March 1994. Only one new journeyman electrician has been hired since Harageones was laid off, that being B. Eccleston, hired on May 31, 1994.

Notwithstanding Rypkema's intemperate behavior on November 24, Harageones was given an extra days work at the Sayre, Pennsylvania project. Respondent's pattern of continuing and recurrent layoffs of similarly qualified employees with considerably more employment longevity with Respondent than Harageones is compelling evidence there was no work for Harageones other than that he might possibly have performed at Rypkema's home, which has not been shown to be other than personal employment by Rypkema. I have also noted that Harageones elected not to respond to Rypkema's offer to meet and discuss employment possibilities with the Respondent, even though Harageones had made several previous efforts to talk with Rypkema concerning renewed employment.

On the whole, by a preponderance of the evidence, I am of the opinion Respondent has shown that Harageones would have been laid off and had no reasonable expectancy of recall[5] even if no union activity had existed. I therefore conclude and find the General Counsel has not established by a preponderance of the credible evidence the layoff and failure to recall Harageones violated Section 8(a)(3) and (1) of the Act. In so finding, I have noted Eccleston was not hired, and Gowen, Nicholas, Olmsted, Spafford, and Peppin (all electricians senior to Harageones) were not recalled to work until after Harageones declined to meet with Rypkema even though Harageones had been seeking such a meeting.

An employer may, absent certain special circumstances, bar nonemployee organizers from its property. *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992). An employer may not, however, bar such access to property that is not the employer's to control. *Payless Drug Stores*, 311 NLRB 678 (1993); *Lechmere, Inc.*, 308 NLRB 1074 (1992); and *Johnson & Hardin Co.*, 305 NLRB 690 (1991). The Respondent was a subcontractor on the jobsites from which its lawyers sought to exclude McPherson. It was itself present at these sites by virtue of its agreement with the general contractors, who were there by virtue of their agreement with the property owners. The effort to bar McPherson is therefore far too broad. The general contractors gave McPherson express permission to enter the jobsites and act as he did. There is no evidence his presence created any dangerous or disruptive conditions or posed a risk of injury to employees or himself. The effort to bar him from all three jobsites on threat of civil and criminal prosecution exceeds the Respondent's authority because it does not have sufficent control over those properties to validate its effort to exclude him. Accordingly, I conclude and find the Respondent's threat and effort to bar McPherson violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. The Union is a labor organization within the meaning of Section 2(5) of the Act.
3. By prohibiting an employee from wearing a union cap, Respondent violated Section 8(a)(1) of the Act.
4. By threatening to take civil and criminal action against a union representative for entrance onto property which it does not control, the Respondent violated Section 8(a)(1) of the Act.
5. The above-unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.
6. The Respondent did not violate Section 8(a)(3) and (1) of the Act by laying off and refusing to recall Harageones as the complaint alleges.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

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[5] Two electricians senior to Harageones are still laid off. Harageones' testimony is credited that he had worn several caps bearing logos or messages unlike Respondent's caps on several occasions prior to November 24 and had not been admonished not to wear them. Accordingly, I concluded the singling out of the union cap for adverse commentary and banishment constituted disparate treatment, and the Respondent violated Sec. 8(a)(1) of the Act by prohibiting Harageones from wearing a hat bearing the Union's logo. *Sears Roebuck & Co.*, 300 NLRB 804 (1990).

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the

Continued

ORDER

The Respondent, Nelson Electrical Contracting Corp., d/b/a Nelcorp, Union, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening to bring civil and/or criminal charges against union representatives for entering onto property it does not control.

(b) Prohibiting employees from wearing union caps.

(c) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Union, New York office and facilities, copies of the attached notice marked ''Appendix.''[7] Copies of the notice, on forms provided by the Regional Director for Region 3, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT threaten to bring civil and/or criminal charges against representatives of International Brotherhood of Electrical Workers, Local Union No. 325, AFL–CIO, or any other union, for entering onto property we do not control.

WE WILL NOT prohibit our employees from wearing caps bearing the Union's logo.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

NELSON ELECTRICAL CONTRACTING CORP.,
D/B/A NELCORP

National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''